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EQUALITIES REAL AND IDEAL:
AFFIRMATIVE ACTION IN INDIAN LAW

COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA. By Marc Galanter.¹ Berkeley: University of California Press. 1984. Pp. xxii, 625. \$36.50.

*Reviewed by Lance Liebman*²

American legal scholars have devoted surprisingly little effort to studying India. In India, as in America, judges, lawyers, and legislators have had to shape a transplanted legal system with English roots. Both countries have adapted English legal institutions to conditions far more heterogeneous — ethnically, racially, linguistically, and geographically — than those of the mother country. It thus seems no accident that India's constitutional structure parallels that of the United States in so many ways. For example, India has a written constitution that embodies principles of federalism and separation of powers, and that provides for judicially enforced guarantees of individual rights.³ Indeed, nowhere else in the world does the judiciary play so central a political role as it does in the United States and India.

Yet the socialist political ideology that prevails in India today conflicts with some of the Western, liberal values embodied in its legal system. On the one hand, Indian courts dispense bourgeois justice in a manner immediately familiar to the English or American observer. The courts use English legal terminology and conduct their business in English, a language understood by only a small fraction of the population. Brilliantly garbed high-court judges are addressed as "your lordship." More importantly, the courts are an effective recourse only for individuals and businesses that can afford the costs of access. On the other hand, modern India has formally dedicated itself to socialist principles of government and to ending the hierarchies that the legal system reflects and reinforces.⁴ Thus, Indian law and society

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³ The Indian Constitution enumerates "Fundamental Rights," which are enforceable in court and which include most of the personal protections assured by the Bill of Rights of the United States Constitution. See INDIA CONST. pt. III. The Indian Constitution distinguishes these rights from "Directive Principles of State Policy," which are constitutional exhortations to the national and state parliaments. See INDIA CONST. pt. IV.

⁴ The preamble to India's Constitution states: "WE, THE PEOPLE OF INDIA, have solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens JUSTICE . . . LIBERTY . . . EQUALITY

at times move in conflicting directions. Their complicated interaction and evolution illuminate the possibilities of preserving individual liberty while achieving economic redistribution, of operating a Western legal system under Asian conditions, and of maintaining an American-style judicial role while giving the highest priority to coping with poverty and social unrest.

The conflicts between Indian law and Indian political goals reflect a deeper tension at the level of Indian identity. The Indian Constitution and legal system stand for the significance of the individual in a country dominated by group identifications. Western legal ideals such as formal equality and equal treatment do not always square with the Indian reality of deep ethnic and religious divisions. To alleviate the effects of these divisions, India has instituted a broad program of preferential treatment for its so-called "Backward Classes," a program whose constitutionality was fiercely debated by the Indian legislature and Supreme Court.⁵ Professor Marc Galanter, the leading American expert on India's legal system, has published a rich and balanced book on this system of what he calls "compensatory discrimination."⁶

Galanter is one of the very few American legal scholars to have spent a considerable amount of time in India.⁷ His extended stays in India have made him well known among Indian judges and law professors. *Competing Equalities* reflects Galanter's fluency with Indian law and society, his many years of research, and his painstaking efforts to shape and distill unruly data. It is the most important work yet written by an American about the Indian legal system, and it is

of status and of opportunity; and . . . FRATERNITY" The words "Socialist" and "Secular" were added by constitutional amendment in 1976. See INDIA CONST. amend. 42, § 2.

⁵ In 1950, pursuant to a national program designed to ensure educational opportunity for the disadvantaged, the State of Madras apportioned seats in its medical and engineering colleges on the basis of ethnic and religious characteristics, allotting only one-seventh of the available places to upper-caste Brahmin students. A Brahmin student sued under Article 29(2) of the Constitution, which provides that "[n]o citizen shall be denied admission into any educational institution maintained by the State . . . on grounds only of religion, race, caste, language or any of them." The Supreme Court held the system unconstitutional in *State of Madras v. Champakam Dorairajan*, 1951 A.I.R. 226 (India). As Galanter notes (pp. 365-68), the government amended the Constitution less than two months later to provide that "[n]othing in [Article 29(2)] . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens" INDIA CONST. art. 15, cl. 4.

⁶ Galanter adopts the term self-consciously, recognizing that "names are not neutral" (pp. 2-3). Indeed, compensation is not the only possible justification for or explanation of the preference system. See *infra* pp. 1687-89.

⁷ Galanter is also an important scholar of United States law, working at the intersection of social science and the legal system. See, e.g., Galanter, *Reading the Landscape of Disputes: What We Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

as good a general work about Indian law and the Indian Constitution as can be found.⁸

Competing Equalities is also a significant work of comparative law. The book does make passing references to the ethnic preference schemes of other countries, such as Israel's program benefiting Oriental Jews and Japan's program favoring the Burakumin. More importantly, however, the book takes a comparative approach in that Galanter analyzes Indian law from the specific perspective of one familiar with the legal history of black-white relationships in the United States. Despite this foreign perspective, Galanter writes with such deep sympathy for contemporary India that his study is likely to receive serious attention in India as well as in the West.

I. COMPENSATORY DISCRIMINATION AND THE INDIAN COURTS

India's system of social classification and hierarchy, labeled a "caste" system by early Portuguese colonists (p. 7 n.1), is thought by some scholars to be an essential aspect of Hinduism,⁹ the religion of about two-thirds of the Indian population. Caste is the most important communal identification of many Hindus. In contrast, India's 200 million non-Hindus — the Moslems, Sikhs, Jains, Parsis, Buddhists, and Christians — derive much of their identity from their religious community. Perhaps no task assumed by India's political or legal system is more important than peacefully keeping India's 700 million people united in one country and bringing them somehow into one society.

Grappling with this task, India has pursued diverse and conflicting goals. As a Hindu nation created by the partition of the subcontinent in 1947, India is committed in some measure to traditional Hindu values. India has also tried, however, to modernize those values. Gandhism, the political foundation of independent India, is rooted in Hindu piety and yet repudiates the hierarchies of caste (and also of sex) that are arguably fundamental to Hinduism. Much of India's governmental structure and economic policy is an attempt to implement under Asian conditions the Fabian socialism that the nation's founders learned at English universities. The broad program of preferential treatment in favor of the disadvantaged, pursued primarily in the areas of legislative representation, government jobs, and education, has drawn on all of these sources and is at the heart of India's effort to maintain unity in the face of manifold division.

⁸ The only criticism the book deserves is that it may have been in the pipeline too long without being revised to reflect events of the 1980s. For example, excerpts from the Indian Constitution included in an appendix (pp. 570-74) are 10 years out of date.

⁹ See M. WEBER, *THE RELIGION OF INDIA: THE SOCIOLOGY OF HINDUISM AND BUDDHISM* 29 (H. Gerth & D. Martindale trans. 1958); Marriott & Inden, *Caste Systems*, 3 *ENCYCLOPEDIA BRITANNICA* 982, 985 (15th ed. 1975).

To facilitate the representation of disadvantaged groups, the Indian Constitution provides that in the Lok Sabha, the lower house of the national legislature, seats are "reserved" for "Scheduled Castes" in proportion to their numbers in India as a whole; in 1976, this provision resulted in the reservation of 14.4% of the seats (pp. 44-45). "Scheduled Castes" is the constitutional euphemism for those whom the English first called "untouchables" (p. 25 n.21), a group whose contours have never been precisely defined.¹⁰ In addition, the Constitution reserves a proportional number of seats, 7% in 1976, for "Scheduled Tribes" (pp. 44-45), groups that are more or less outside the caste system and are characterized by "tribal origin, [a] primitive way of life [and] remote habitation" (p. 152). Seats are reserved in a similar manner in state legislatures. Deciding which of the thousands of groups in the complex Indian mosaic are "Scheduled Castes" or "Tribes" is accomplished by means of an official decisionmaking process.

Certain features of the legislative reservations seem remarkable to an American. In the United States, the combination of a dispersed black population and a single-member-district system leads to black representation in Congress and in state legislatures that is always substantially smaller than the percentage of the population that is black. Our constitutional jurisprudence has wrestled with whether voting districts can be redrawn in ways designed to create black electoral majorities.¹¹ In contrast, India's system, while allowing all adults to vote, permits only Scheduled Caste members to be candidates in Scheduled Caste districts (p. 45).¹² Because members of the Scheduled Castes are dispersed throughout the country, seats are reserved for them in districts with populations overwhelmingly made up of persons not belonging to the Scheduled Castes. Tribal peoples, in contrast, are more likely to occupy geographically distinct areas, and thus seats are reserved for members of the Scheduled Tribes in areas with significant tribal populations.

According to Galanter, the Scheduled Caste and Tribe representatives are "widely believed" to be "less articulate, less assertive, and

¹⁰ According to Galanter, "The selection [of Scheduled Castes] has proceeded primarily on the basis of 'untouchability' — measured by the incidence of social disabilities — but this criterion has been combined in varying degrees with economic, occupational, educational, and . . . residential and religious tests" (p. 134). Galanter notes that "untouchability" itself "had no technical legal meaning before the Constitution abolished it" (p. 145).

¹¹ See, e.g., *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (holding that New York's use of racial criteria in revising its reapportionment plan to establish black majority voting districts did not violate the fourteenth or fifteenth amendments).

¹² This system may have made more sense when most districts elected two members of the Lok Sabha. Most designated Scheduled Caste districts elected one Scheduled Caste member and one nonrestricted member. Now, however, all constituencies elect one member (pp. 46-47 n.26). Galanter refers to a "massive withdrawal by voters" from participation in the reserved seat elections (p. 549).

less independent than their fellows" (p. 52). He cites data suggesting that they have been relatively less "active" and "influential" and that they are less likely to hold leadership positions (p. 52). Traditionally, however, at least one Scheduled Caste representative serves in the national cabinet. Even if these representatives are generally less active, they may nonetheless effectively represent the interests of their constituents. Galanter notes that holders of the reserved seats seem to "have been prominent and sometimes influential" in matters relating to the welfare of the groups they represent (p. 53).

Government employment, another area addressed by the preferential treatment program, is of extreme importance in India, a country where such jobs carry security, pay, and dignity hard to match in the private sector. The law reserves a substantial percentage of these jobs: in 1970, "of posts recruited directly on an all-India basis by open competitive examination," 15% were reserved for Scheduled Castes and 7.5% for Scheduled Tribes (p. 86). Unlike legislative reservations, which are set aside only for Scheduled Castes and Tribes, however, preferences in government employment and educational admissions were extended early on to all of the "Backward Classes" — disadvantaged groups identified on the basis of economic and social criteria in addition to caste.¹³ Beneficiaries of this program obtain government jobs with test scores significantly below those of other applicants, although Galanter suggests that critics have overstated the extent to which this situation in fact arises (pp. 111-13). Galanter indicates that the job reservation program has substantially improved the economic situation of its beneficiaries, at least those in the Scheduled Castes. Perhaps 6% of the Scheduled Caste families in India have a family member who has obtained a government job on this basis (p. 108).¹⁴ The program does not apply to private sector employment (p. 103), even though government involvement in the "private" economy is far more extensive in India than in the United States.

Since independence, there has been a vast expansion of the Indian educational system (p. 58), the third area targeted by the program of preferential treatment. The Indian government refers to education as

¹³ Chapter 6 of Galanter's book discusses the many meanings given to the term "Backward Classes" in different parts of India at different times under different official programs. A "rough equivalent" for Backward Classes is "weaker sections" (p. 3). The earliest use of the term may have been in 1880 as a description of "a list of groups, also called illiterate or indigent classes, entitled to allowances for study in elementary schools" (p. 154 n.1). In 1921, the State of Mysore instituted a preferential recruitment program providing government jobs to members of "backward communities," which were defined as "all communities other than Brahmins, who are not now adequately represented in the public service" (p. 156). More recently, India's courts have insisted that factors other than caste be taken into account in defining the Backward Classes. See *infra* pp. 1689-90.

¹⁴ Galanter observes that "reservations succeed, where exhortation and good will do not, in getting members of the beneficiary groups into government service" (p. 105).

a great equalizer of opportunity (p. 58 n.65), and, as in many under-developed countries, student status is coveted. With a broad program of fee waivers, scholarships, reservations of places at professional schools, and some lowering of admission standards at these schools, India has attempted to include the disadvantaged throughout its educational system (pp. 59-64). As with the employment preference program, the program of educational preferences was extended almost from its inception to cover not only the Scheduled Castes and Tribes, but also India's Backward Classes in general (pp. 62-64). Although Galanter calls the program's accomplishments "stunning" in relation to pre-independence conditions (p. 61), he also notes that the current proportion of India's disadvantaged who receive education — even primary education — remains quite small (pp. 58-59, 61).¹⁵ In addition, the drop-out rate of members of Scheduled Castes and Tribes from universities has been "staggeringly high" (p. 63), although students from Backward Classes other than the Scheduled groups appear to be having greater success (p. 63).

The problems encountered by members of Scheduled Castes and Tribes at universities are of course at least partly due, as Galanter points out, to the inferior schooling they receive at the intermediate levels (pp. 61, 63). One cannot help wondering, however, whether these students' immersion into an environment dominated by the higher castes does not also contribute to their difficulties. The visitor to Indian universities often hears high-caste professors speak disparagingly about the qualifications of low-caste students and about the effect of their admission on the quality of the university. When that visitor is an American professor, he sees immediate parallels to the attitudes of some American teachers and students toward beneficiaries of affirmative action admissions and hiring programs; he also sees in India parallels to the debates in the United States about whether minority¹⁶ and female students learn more in integrated or in segregated classrooms.

Galanter's book is chiefly an analysis of reported judicial decisions about the compensatory discrimination system. Some of the litigation concerns the inevitable implementation problems in so complex a scheme of classification. These problems include the status of political candidates who have moved from states where they were classed as members of a Scheduled group to states where they are not (pp. 139-43), the preference ramifications of government service promotional

¹⁵ Galanter's statistics, unfortunately somewhat dated, indicate that in 1961 less than 10% of the members of Scheduled groups were literate (pp. 58-59) and that fewer than 20,000 had graduated from college, at a time when India had a total of 1,147,000 college graduates (p. 61 n.87).

¹⁶ See, e.g., St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, in *RACE AND SCHOOLING IN THE CITY* 84-103 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981).

examinations (pp. 100-02), and the consequences of religious conversion (pp. 327-31). In other instances, judicial decisions have gone to the very core of the compensatory program, as is dramatically evidenced by the cases concerning group eligibility under the expanding category of the Backward Classes (pp. 222-81).

Political leaders have argued that millions of Indians who rank above "untouchables" nonetheless suffer from past economic and social deprivation and need assistance to adapt to the modern society India seeks to create. The recognition of the need for preferences for certain groups has led others, most of whom could plausibly assert a need for help, to campaign for inclusion. The preference system thus became embroiled in politics, and in the late 1970s legislatures added several groups to the list of designees (p. 187). The judiciary took an important step toward limiting the preference system when it stated in *Balaji v. State of Mysore*¹⁷ that the Indian Constitution did not permit preferences to be granted to as many as 50% of a state's population.¹⁸ In addition, courts have required minimal "merit" qualifications for government employment and for university admissions (pp. 420-25).¹⁹ In most states today, preferences benefit between 25% and 50% of the population.

Galanter persuasively argues that the intersection of democratic politics and the award of job and educational preferences to well-established groups inherently entails some aspects of a spoils system. Politicians trade government jobs for the votes of ethnic communities in ways that seem familiar to those who have observed big-city politics in the United States. The Indian courts have demanded that the legislatures choose to benefit groups that are in fact more deprived than those not chosen. They have thus supervised the legislature's distribution of employment preferences in much the same way that American civil service commissions oversee the allocation of jobs by municipal politicians.

At the same time, judicial review has brought into the open the entire process — including the role played by the judiciary itself. India and the United States are two of the very few countries in the world in which major political struggles can be chronicled through written court decisions.²⁰ The Indian political system has been remarkably tolerant of this judicial role. The preference system is an

¹⁷ 1963 A.I.R. 649 (India).

¹⁸ See *id.* at 663; see also *Ramakrishna Singh v. State of Mysore*, 1960 A.I.R. 338, 349 (Mysore) (holding invalid a scheme on the ground that designation of 95% of the population as Backward Classes was "a fraud on the Constitution").

¹⁹ See, e.g., *Dilip Kumar v. Government of Uttar Pradesh*, 1973 A.I.R. 592 (Allahabad).

²⁰ Galanter notes that Indian courts have increasingly looked to American precedents in interpreting constitutional provisions and that, in particular, Indian lawyers and judges have drawn on United States fourteenth amendment jurisprudence in preference cases (pp. 493-94 n.76).

ongoing subject of debate in the press and has even occasioned riots (p. 40 n.65). Yet Galanter shows that the courts have occupied the vast area within the preference system in which rules need to be prescribed and fundamental policy choices need to be made, and he demonstrates that on the whole their decisions have been implemented. The judiciary, commanding more trust and respect than other elements of the Indian government, has thus played an essential role in the operation of the compensatory discrimination system, at little cost to its general legitimacy.²¹

Competing Equalities affords a close and revealing perspective on the Indian judiciary's efforts to accomplish this task. One broad conclusion that emerges from the preference litigation is that the courts have not on the whole been able to systematize the law. Courts "address the exigencies of different factual situations and have to apply doctrine which they have encountered infrequently" (p. 539). In other words, judges have sought fair solutions to a series of individual cases, but have provided few generalizations that have proved useful in deciding later cases.²²

Indian judges address the specifics of their country's complex social conditions with what seems to the Western observer to be almost too little trepidation. The questions that arise in these cases cannot be resolved by logic or by reference to social science literature; instead, they require judgment based on a knowledge of the intimate details of caste experience.²³ Courts have sometimes treated such social "facts" as matters to be established in the trial record. More often, judges write as if they "know" how the caste system works or what it means to convert to a different religion. Their opinions are full of off-the-cuff statements about Indian society, religions, ideas, and behavior. The Supreme Court seems to give little weight to the decisions of state courts (pp. 495-97), even though religious and caste practices vary so widely throughout the country that local courts might have greater knowledge in these matters.

²¹ Galanter suggests that the courts legitimate the compensatory discrimination system by limiting the scope of its application (p. 545).

²² "[I]n India 'new [doctrinal] ideas are added without old ideas being discarded. . . . [L]aw does not evolve in the Supreme Court [of India], it meanders'" (p. 540) (quoting R. DHAVAN, *THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES* 451-52 (1977)). Galanter concludes:

[B]oth formalism and incoherence are built into the structure of the situation. A conceptualistic intellectual tradition combines with imponderable questions and limited fact-finding capacities to produce overgeneral rules. Heavy work loads, sitting in small and shifting benches, lack of expertise on the part of advocates, and a lack of drive for synthesis lead to the elaboration of various inconsistent strands of authority. The two tendencies are mutually reinforcing: the plurality of rules adds to overload and ambiguity, which is temporarily resolved by further rule elaboration. (P. 540).

²³ Judges must decide, for example, whether an individual experiences "loss of caste" by changing his or her religion from Hinduism to Christianity, Islam, or Buddhism (pp. 315-16).

In the United States, the question of judicial capacity to interpret social science evidence in making decisions about the experience of minorities was explicitly confronted in the debate triggered by the famous footnote eleven in *Brown v. Board of Education*.²⁴ More recently, Chief Justice Burger's attempt to ground affirmative action in employment on homey insights about social reality has provoked criticism from some social scientists.²⁵ Nonetheless, implementation of racial and ethnic categorizations in this country has not required judges to classify individuals and groups to anything like the extent called for by the Indian system.

The reader of Indian opinions is often left with the impression that although the opinions consist of serious and intelligent observations based on the experience individual judges have had within Indian society, they mainly express the views of relatively affluent, high-caste, urban, and westernized Indians about groups with which they lack direct experience.²⁶ It is surprising that Galanter, a sociologist, does not make more than he does of what passes in judicial opinions for knowledge of castes, tribes, and "backwardness." Although he occasionally raises interesting questions about the "facts" or assumptions that judges employ, he does not attempt a comprehensive discussion of how these "social facts" affect the jurisprudence of preference systems.

II. THE CONTRADICTIONS OF COMPENSATORY DISCRIMINATION

Competing Equalities is also about the practical and conceptual difficulties arising from India's compensatory discrimination program. Tensions and contradictions emerge in the judicial implementation of India's program, tensions and contradictions that may be relevant to our own efforts to overcome a history of caste-like discrimination.

One set of problems involves the familiar claim that particular beneficiaries of preference programs have not been deserving. It is the best off among the preferred groups who obtain government jobs and admission to universities (pp. 468-69). These individuals, how-

²⁴ See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing social science works to support the proposition that mandated segregation has negative effects on black schoolchildren); see also J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 84-99, 106 (1985) (discussing the controversy surrounding the footnote). Chief Justice Warren later said: "It was only a note, after all." See R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 706 (1976).

²⁵ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-33 (1971). For criticism of the *Griggs* approach by social scientists, see *Report of the Committee on Ability Testing, Assembly of Behavioral and Social Sciences, National Research Council*, in *ABILITY TESTING: USES, CONSEQUENCES AND CONTROVERSIES* (A. Wigdor & W. Garner eds. 1982).

²⁶ In fact, when these matters are litigated, Brahmin lawyers often represent both sides (p. 518).

ever, are said to be underqualified for the positions made available to them. Many in the higher status groups feel that injustices are being done to them and to their children (pp. 109-10, 549) and that India is suffering because substantially fewer qualified persons receive educational opportunities and government jobs (p. 111).

These objections challenge the preference programs at the level of individual desert and compensation. But affording opportunities to individuals who have been victims of discrimination and who could perform well if freed of social handicaps is not the only possible justification for affirmative action. India seeks to grant university admission and government jobs to persons of low caste in part to distribute society's rewards more equitably among groups in the population, in part to support leadership cadres within low-caste communities, in part to create visible symbols and role models for young people of low caste, and in part to give all segments of the population the experience of studying and working in multicaste environments. At least some of these goals can be achieved even if the individuals who receive assistance are not particularly needy or even particularly effective at their jobs.

Yet recognizing that preference programs can have many justifications increases the difficulty of deciding which groups should be selected as beneficiaries. The legislative reservations, for example, stand for the proposition that groups with no political power in the past should be given a significant role in making the nation's laws. The Scheduled Castes and Tribes, however, are by no means the only groups that, under this justification, require assured representation. Indeed, under British rule, the Government of India Act of 1919 assured representation for Moslems, Sikhs, Christians, Anglo-Indians, and Aborigines, as well as for the so-called "Depressed Classes" (p. 363 n.1).

One reason for the reservation of legislative seats for Scheduled Castes, but not for disadvantaged non-Hindu groups,²⁷ was a desire among the founders of independent India to create a nation that held most of its population within the ambit of Hinduism.²⁸ This concern

²⁷ A presidential order of 1950 stated: "[N]o person professing a religion different from Hinduism shall be deemed a member of a Scheduled Caste" (p. 144). Galanter writes:

The religious test for Scheduled Castes is employed, not as a positive test for selecting appropriate groups for inclusion, but as a disqualification of individuals and groups who otherwise meet the criteria, thereby inevitably discouraging conversion. There is reason to think that this was at least part of its purpose. (P. 144) (footnote omitted).

²⁸ Different reasons explain the grant of legislative reservations to Scheduled Tribes. For the Scheduled Castes, "it is hoped that the disabilities and disadvantages that separate them from their compatriots will eventually be overcome by the preferential treatment" (p. 153). For the Tribes, however, defined in 1965 by the government-appointed Lokur Committee as those with "primitive traits, distinctive culture, geographic isolation, shyness of contact with the community at large and backwardness," the national policy is "preservation of their separate

was evidenced by the success of Dr. Ambedkar, a leader of "untouchables" earlier in this century, in extracting constitutional concessions for his constituents by threatening a mass conversion of "untouchables" to Buddhism (p. 326 n.191). The reservation system today still denies protection to "untouchables" who convert to another religion (pp. 143-44).²⁹ A consequence is that poor and low-status members of religions other than Hinduism, especially Muslims, many of whom are descended from persons who converted from Hinduism to escape untouchability, remain unaided, if they are not in fact disadvantaged, by the compensation program.

The same issues of limiting group eligibility along religious and caste lines have surfaced in the areas of job and educational preferences. Here the courts have been instrumental in insisting on other criteria for limiting eligibility. The Supreme Court, in the landmark *Balaji* case, held that caste alone could not be the basis for designating a preferred Backward Class (p. 191).³⁰ In another case, the Supreme Court ruled that a Backward Class could be defined in terms of income and occupation alone, without reference to caste (p. 233).³¹ More recently, the Court upheld a caste-based system that took "sufficient" account of social and educational criteria (p. 238).³²

These judicial acts of group categorization are problematic not only because the criteria used are controversial, but also because any criteria are necessarily inadequate. Contemporary scholarship suggests that Indian society was never as immobile as the conventional Western interpretation suggests (p. 349). Whether or not this scholarship is accurate, it is certainly true that people in modern India move, marry outside their group, adopt outsiders, and change occupations. An individual may therefore participate in a complex pattern of group affiliations. Litigation, however, has forced judges to impose categories on the ambiguous and fluid reality of Indian society. Courts declare that some groups are "backward" whereas others are not, and they decide which group designation is appropriate for an individual whose life straddles different communities. Galanter describes this

integrity, rather than complete assimilation. . . . to balance improvement of their condition and a degree of assimilation with preservation of their distinctiveness and a measure of autonomy" (pp. 152-53).

²⁹ One exception to this rule is that the law now deems certain Sikhs to be Scheduled Caste members (p. 144), even though the Sikh religion denies the existence of castes.

³⁰ See *Balaji v. State of Mysore*, 1963 A.I.R. 649, 658-60 (India).

³¹ See *Chitralakha v. State of Mysore*, 1964 A.I.R. 1823, 1826 (India).

³² See *State of Andhra Pradesh v. Balaram*, 1972 A.I.R. 1375, 1396 (India). Of course, deciding whom to favor in a country with so many who are poor is a difficult task. The answer of the Indian legislators and judges has been that the criterion of poverty cannot be ignored, but it cannot be sufficient alone. There must also be "shared attitudes and dispositions that render it unlikely that members of a group will, without special help, take advantage of opportunities to improve their position" (p. 239).

process of judicial classification as the development of "authoritative official learning on the question of group identity" (p. 564) and views India's experience with ethnic classification as "a relatively benign jurisprudence of group identity" (p. 564). But he is struck by "the irony of employing group identity in the service of reducing disparities among groups" (p. 564) and worries that the system may "gravitate into a comprehensive system of group allotments" (p. 567).

On the issue of group categorization, Galanter makes his major policy recommendation to Indian legislators and judges. Writing as a sympathetic social scientist, he recommends replacement of simple categories with a multidimensional selection process that "give[s] recognition to the areas of blurring and overlap that are found within" the Indian caste system (p. 348). He advocates a system that "is congenial to multiple and overlapping affiliations . . . [and] address[es] itself to whether, in the light of the policy of the particular legislation involved, the individual can be said to be a member of the group concerned" (p. 348). Galanter wants judges to encourage the preference system to use a greater variety of criteria so that the selection of those to be benefited can take account of a broad and sophisticated range of socially relevant characteristics. And yet, as he acknowledges, the system requires clerks to implement millions of individual determinations. Great sophistication in choosing among the truly needy is probably impossible and certainly cannot be successfully mandated by judges.³³ Furthermore, a very complicated system with a great deal of discretion will tend to benefit those who can understand and manipulate the system rather than those who are most "deserving" (p. 472).

Finally, the judicial categorization of the populace poses a problem not merely at the level of Indians' personal identities, but also at that of India's national identity — a problem challenging the very ideal of equality. On the one hand, the Indian Constitution seeks to abolish castes, committing itself to equality³⁴ and establishing equal treatment for all Indian citizens.³⁵ On the other hand, the constitutional provisions permitting preferential treatment of members of the Backward Classes³⁶ are exceptions to the ideals of formal equality and equal treatment, and preference schemes give official recognition to caste identities.

³³ The difficulties that courts have encountered supervising the selection process are exemplified in a series of cases from the State of Jammu and Kashmir that Galanter discusses (pp. 450-55). The judges held that a particular group was not sufficiently "backward" to be eligible for the extra points they were receiving on examinations for government jobs. The bureaucrats switched from tests to interviews and thereby managed to pick people from the group they wanted.

³⁴ See *supra* note 4.

³⁵ See, e.g., INDIA CONST. arts. 15(1), 16(2), 29(2).

³⁶ See *supra* note 5.

India must indeed grapple with "competing equalities": an ideal of equality, transplanted perhaps from Western constitutional history, coexists uneasily with the reality of India's deeply divided society. Nehru, speaking as Prime Minister, put the conflict thus: "[W]e arrive at a peculiar tangle. We cannot have equality because in trying to attain equality we come up against some principles of equality" (p. 379).³⁷ The United States, of course, confronts a similar challenge as it struggles to find a third stage of civil rights policies. First anti-discrimination edicts and then affirmative action contributed to significant educational and employment gains for blacks. Yet it appears that these policies will provide little assistance to a substantial segment of the black community and that large disparities between the aggregate positions of blacks and whites will persist into the indefinite future. Meanwhile, affirmative action policies are on the defensive under the Reagan administration and in the courts. In the United States, as in India, "equality" means no single thing and policies aimed at achieving equality conform to no consistent theory.

Despite the formidable difficulties posed by the conundrum of fighting for equality with legally mandated inequality, Professor Galanter concludes that India has found a workable approach:

India has managed to pursue a commitment to substantive justice without allowing that commitment to dissolve competing commitments to formal equality that make law viable in a diverse society with limited consensus. The Indian experience displays a principled eclecticism that avoids suppressing the altruistic fraternal impulse that animates compensatory policies, but that also avoids being enslaved by it. (P. 567).

III. CONCLUSION

Ever the careful social scientist and cautious lawyer, Professor Galanter maintains that his years of work on this subject have led him to "no single big lesson" (p. 563). He is certain that the system of compensatory discrimination, "more congenial in practice than in theory" (p. 567), has achieved gains for India that outweigh its conceptual difficulties. He catalogues the losses as well as the gains that flow to individuals and groups designated Scheduled or Backward (pp. 551-52). Other Indians, for example, see the members of these groups as of dubious competence, having achieved their positions only through the preference system (p. 98). But Galanter also recognizes that in the Indian context the system represents both a denial of any hope of immediately achieving a society of homogeneous individuals

³⁷ The early amenders of India's Constitution obviously saw the contradiction and provided only for a 10-year system of reservations. But in each decade since, the Constitution has been further amended to extend the system for an additional 10 years (p. 46).

(p. 561) and an acceptance of pluralism in a society that survives by appearing minimally fair to enough groups. India may be purchasing short-term gains at the expense of substantial longer-term costs to its own goals and ideals. In particular, by helping to consolidate the power of leaders who serve as brokers for narrow communal groups, India may be making it less likely that the country will ever surmount its group tensions.

American sociologists, rejecting simplistic "melting pot" predictions, no longer expect Americans to forget their ethnic origins and identities. Rather, they hope that families will take pride in their differences and "mediate" their relations with the larger society through identifications that are very likely to be racial, ethnic, and national.³⁸ The question for Americans is to what extent government should give official sanction to such identifications and distribute benefits and rewards according to ethnic quotas. Many have argued that the inevitable result of reliance on ethnic quotas will be group tensions and perceptions of unfairness resulting from the process and damage to the legitimacy of the system that distributes jobs and educational opportunities. Galanter demonstrates that a more populated and complicated country than the United States has used such a system for thirty-five years, and that the system, despite presenting social risks, has achieved real gains for those formerly deprived.

Hierarchy has survived in India, but so have democratic politics, a legal system with high aspirations, and much wider civil liberties than exist in most developing countries. Although India still faces great problems, the country has so far escaped both tyranny and revolution. Compensatory discrimination has contributed to the survival of independent India.

³⁸ See, e.g., N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* (1963); N. Glazer, *The Peoples of America*, in *ETHNIC DILEMMAS: 1964-1982*, at 17 (1983).

Galanter expresses a similar vision of India's possible development:

If secularism is defined in terms of the elimination of India's compartmental group structure in favor of a compact and unitary society, then the compensatory discrimination policy may indeed have impeded secularism. But one may instead visualize not the disappearance of communal groups but their transformation into components of a pluralistic society in which invidious hierarchy is discarded while diversity is accommodated. In this view compensatory discrimination policy contributes to secularism by reducing group disparities and blunting hierarchic distinctions. (P. 561).